No. 83

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

JACOB HARK AND HYMAN YAFFEE, CO-PARTNERS DOING BUSINESS AS LIBERTY BEEF COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the district court (R. 25) is reported in 49 F. Supp. 95.

JURISDICTION

The order of the district court dismissing the indictment was entered on March 31, 1943 (R. 29). Petition for appeal was filed on April 30, 1943, and was allowed the same day (R. 29, 30). The jurisdiction of this Court is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the

Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. II, sec. 682, commonly known as the Criminal Appeals Act, and Section 238 of the Judicial Code as amended, 28 U. S. C., sec. 345. This Court on June 21, 1943, postponed further consideration of the question of jurisdiction to the hearing of the cause on the merits (R. 34).

QUESTIONS PRESENTED

Two preliminary questions as to the jurisdiction of this Court under the Criminal Appeals Act are presented. They are:

(1) Whether the appeal, taken within 30 days after the district court entered an order quashing the indictment but more than 30 days after it rendered its opinion, was taken within 30 days after its "decision or judgment" had been rendered.

(2) Whether the judgment and decision of the district court was either in substance one "sustaining a special plea in bar" or one based upon the construction of the statute upon which the indictment was founded.

On the merits, the question presented by the appeal is:

(3) Whether, under the provisions of the Emergency Price Control Act of 1942 making wilful violations of maximum price-regulations issued by the Price Administrator a criminal offense, revocation of such a regulation terminates the power to prosecute for violations of the revoked regulation committed while it was in effect.

STATUTES INVOLVED

Section 13 of the Revised Statutes, 1 U. S. C. sec. 29, and the pertinent provisions of the Criminal Appeals Act and of the Emergency Price Control Act of 1942 are set forth in the Appendix, *infra*, pp. 35–46.

STATEMENT

The indictment in this case was returned on December 21, 1942. It charges Jacob Hark and Hyman Yaffee, copartners doing business as Liberty Beef Company, with selling wholesale cuts of beef at prices higher than those determined by Maximum Price Regulation No. 169, as amended, issued pursuant to the Emergency Price Control Act of 1942.[1]

The indictment alleges that on June 19, 1942, the Price Administrator issued Maximum Price Regulation No. 169;[2] that it became effective as to wholesalers on July 20, 1942; that at all times referred to in the indictment said Regulation, as amended, was in effect; and that Section 1364.51 thereof provided that no person should sell any

[1] Section 2 (a) of the Act (*infra*, p. 37) provides that the Price Administrator may "by regulation or order" establish such maximum prices for a commodity as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. Section 4 (a), *infra*, p. 39, makes it unlawful to sell any commodity "in violation of any regulation or order" under Section 2. Section 205 (b), *infra*, p. 41, makes it a criminal offense wilfully to violate any provision of Section 4.

[2] See 7 Fed. Reg. 4653.

wholesale cut of beef at a price higher than the maximum price permitted by Section 1364.52 thereof.[3]

The indictment contains 24 counts (R. 1–12). Each count alleges that on a particular date appellees made a specified sale of wholesale cuts of beef at prices higher than those determined by Maximum Price Regulation No. 169 as amended. All of the dates on which such sales are alleged to have been made fall between September 29, 1942, and November 13, 1942.

Each of the appellees filed a motion to quash the indictment (R. 12, 17)[4] which, in addition to alleging that the Emergency Price Control Act of 1942 was unconstitutional, alleged that "the indictment sets forth no crime against the United States as of the date of the indictment" for the reason that Sections 1364.51 and 1364.52 of the Regulation had been revoked by an order of the Price Administrator which became effective De-

[3] These allegations, found in paragraphs 2–4 of count one (R. 1), were reaffirmed and incorporated in each subsequent count of the indictment.

[4] The motions raised a number of other questions which were not discussed or ruled upon by the court below and are unnecessary to the discussion here. Appellee Hark also filed a second motion to quash (R. 16) two pleas in abatement (R. 21, 22) and a demurrer (R. 24) and appellee Yaffee filed a plea in abatement (R. 23). These pleadings raised additional questions which were not discussed or ruled upon by the district court and are not pertinent here.

cember 16, 1942, prior to the return of the indictment (R. 16, 20).[5]

On March 5, 1943, the district court rendered an opinion holding that the Emergency Price Control Act of 1942 was within the war power of Congress and did not improperly delegate legislative authority to the Price Administrator, but that appellees "cannot be held to answer to this indictment" because the pertinent provisions of the Regulation which they were charged with violating had been revoked prior to the return of the indictment. The grounds which the court gave for the latter conclusion were (1) that the general rule that the repeal of a statute without reservation of the right to prosecute for past violations operates to prevent further proceedings in pending prosecutions applies to revoked administrative regulations and (2) that the general saving provision of Section 13 of the Revised Statutes is limited to the repeal of statutes and does not

[5] On December 10, 1942, the Price Administrator issued a Revised Maximum Price Regulation No. 169, to become effective December 16, 1942, which stated that sections 1364.51 through 1364.67 "are revoked" and established new maximum prices (7 Fed. Reg. 10381).

Both regulations established maximum prices for wholesale cuts of beef and veal, and both adopted the period March 16–28, 1942, as the base period for ascertaining the maximum permitted prices. The earlier regulation established maxima for each vendor based on his own prices during the base period; the later regulation established dollars-and-cents maxima by zones, based on prices generally prevailing therein during the base period.

apply in the case of revocation of an administrative regulation. (R. 27–29.)

On March 31, 1943, the district court entered an order that the indictment "be and it hereby is quashed," and on April 30, 1943, it allowed the United States an appeal to this Court from its order of March 31, 1943 (R. 29, 30).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

(1) In holding that criminal liability for violation of a regulation issued under the Emergency Price Control Act of 1942 was extinguished by revocation of the regulation prior to the return of the indictment.

(2) In holding that Section 13 of the Revised Statutes did not prevent the release of criminal liability for violation of a regulation revoked prior to the return of the indictment.

(3) In sustaining the defendants' motions to quash the indictment.

SUMMARY OF ARGUMENT

I

A. The judgment quashing the indictment entered on March 31, 1943, was the court's "decision or judgment" within the meaning of the Criminal Appeals Act, and the present appeal is therefore timely. Under circumstances precisely like those in the present case, this Court has uniformly taken jurisdiction of appeals under the

Criminal Appeals Act. To construe the words "decision or judgment" as meaning the court's formal order of judgment avoids the serious ambiguities and uncertainty as to the time and basis for appeal which would result from a contrary conclusion. In any event, even if the district court originally intended to incorporate its judgment in its opinion, it superseded such judgment by its later formal order of judgment. The present appeal is therefore timely since, when a court vacates its judgment during the term, the time for appeal runs from the date of the superseding judgment.

B. This Court has jurisdiction under the provisions of the Criminal Appeals Act authorizing direct review of a judgment "sustaining a special plea in bar." Whether the judgment is of this character is to be determined not by form, but by substance. *United States* v. *Goldman*, 277 U. S. 229, 236. If its effect is to bar further prosecution for the offense charged it is in substance one sustaining a plea in bar whatever the designation of the plea upon which the court acted. In the present case the plea sustained was not based on any defect in the indictment or any irregularity in the grand jury proceedings, and it sought not a mere abatement of the indictment but a complete bar against further prosecution. This Court has taken jurisdiction under the Criminal Appeals Act of an appeal from a judgment sustain-

ing the defense, presented by a plea designated a plea in abatement, that termination of the statute upon which the indictment was founded barred further prosecution. *United States* v. *Chambers*, 291 U. S. 217.

This Court also has jurisdiction under the provisions of the Criminal Appeals Act authorizing appeal to it from a judgment quashing an indictment where the decision was based upon the construction of the statute on which the indictment was founded. The district court's decision was based on its construction of the provisions of the Emergency Price Control Act of 1942 which penalize violations of regulations of the Price Administrator, namely, that these provisions do not authorize continuance of prosecution after the violated regulation has been revoked. Cf. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304. The statute was not the less construed because it was construed in the light of the application to it of certain general principles of statutory construction. See *United States* v. *Borden Co.*, 308 U. S. 188, 195.

II

The basis for the rule that, in the absence of a saving provision, the repeal of a statute terminates the right to prosecute for prior violations is that if the prosecution continues there must be a continuing statute to vivify it. But where the statute, as in the present case, provides for con-

tinuing price control through the medium of varying administrative regulations and penalizes willful violations of such regulations there is a continuing statute vivifying prosecution notwithstanding revocation of the violated regulation. In such a case, it is the statute which establishes the crime and imposes the penalty. Revocation of a particular regulation is not a *pro tanto* repeal of the statute. This Court has held that, under a statute authorizing issuance of a presidential proclamation and making it an offense to violate any proclamation so issued, revocation of the proclamation does not terminate liability for violations committed while the proclamation remained in force. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304.

Whatever presumption of forgiveness for past offenses may attach to the repeal of a statute, no such presumption arises where the policy which Congress has laid down, and which is to be carried into effect through the medium of administrative regulations, is as much in force at the time of prosecution as at the time the alleged offense was committed. Moreover, it cannot be presumed that Congress intended that the penalties which it imposed for willful violation of the regulations of the Price Administrator should be largely ineffective, a result which would follow from the district court's construction of the statute. Under this construction, violators of price regulations could escape punishment by the simple ex-

pedient of keeping the proceedings against them alive in the courts until the necessities of administration called for issuance of a new and different regulation constituting, in legal effect, a revocation of the violated regulation.

The district court's theory was that since regulations of the Price Administrator are a step in the legislative process, they are to be subsumed under the general rules of law applicable to the repeal of statutes. We submit that if this theory is correct, the regulations must also be assimilated to the statute for the purpose of determining the application of Section 13 of the Revised Statutes, which provides that prosecutions for past offenses may be maintained notwithstanding the repeal of a statute unless the repealing statute expressly provides otherwise. Accordingly, consistent application of the theory of the decision below would bring the present prosecution within the saving provisions of Section 13. The section has been held applicable to revoked administrative regulations.

ARGUMENT

I

THIS COURT HAS JURISDICTION UNDER THE CRIMINAL APPEALS ACT

A. THE APPEAL WAS TAKEN WITHIN THE TIME PRESCRIBED BY THE CRIMINAL APPEALS ACT

The district court filed an opinion on March 5, 1943, stating its reasons for holding that appellees

could not be required to answer the indictment, and at the end of the opinion the court epitomized the conclusion which it had reached on appellees' motions to quash by stating: "The motion to quash is granted" (R. 29). On March 31, 1943, the court gave effect to this conclusion by entering the following judgment (R. 29):

> This cause came on to be heard upon the defendant's motion to quash the indictment * * *. * * *. After hearing arguments of counsel for the defendant and of the United States Attorney, it is
>
> Ordered that the indictment be and it hereby is quashed on the ground that the Regulation alleged to have been violated was revoked prior to the return of the indictment.

On April 30, 1943, the United States petitioned for allowance of an appeal from the order "quashing the indictment" entered on March 31, 1943. The court on the same day allowed an appeal from this order. (R. 29, 30.)

Appellees in their statement opposing jurisdiction on appeal have taken the position that the decision on the motion to quash was made on March 5, 1943, when the district court filed its opinion, and that the appeal is therefore not timely under the requirement of the Criminal Appeals Act (*infra*, p. 35) that all appeals thereunder to this Court "shall be taken within thirty days after the decision or judgment has been ren-

dered." The Government submits that the time for appeal commenced to run from the entry of judgment on March 31, 1943.

The precise question was argued and disposed of by this Court in two cases at recent Terms. In *United States* v. *Resnick*, 299 U. S. 207, the opinion of the district court on demurrer to an indictment concluded: "* * * the Demurrer is, therefore, sustained." That opinion was filed March 11, 1936. On April 14, 1936, a formal order was entered sustaining the demurrer. The petition for appeal was filed April 14 and allowed the same day. The question of its timeliness was raised by motion to dismiss, and was fully argued on both sides. This Court postponed further consideration of the question of its jurisdiction to the hearing of the case on the merits; the Court entertained the appeal and did not further advert to the question of its timeliness. Subsequently, in *United States* v. *Midstate Horticultural Company*, 306 U. S. 161, the same issue was presented. An opinion was filed on June 16, 1938, concluding: "* * * the demurrers are sustained." On July 2, 1938, an order sustaining the demurrer was entered. Petition for appeal was filed and allowed on July 20, 1938. Appellees moved to dismiss in this Court. The Court noted probable jurisdiction, and in its opinion (p. 163, footnote 2) explained its denial of the motions to dismiss, stating: "The appeals were from the judgments and

orders of July 2, and not the previous written opinion."

These decisions appear to reflect the unbroken practice of this Court. As the Court is aware, the district courts almost invariably enter a formal order or judgment sustaining a demurrer to an indictment after an opinion has been rendered concluding that the demurrer is sustained.[6] In a number of cases under the Criminal Appeals Act in which no objection was urged to the jurisdiction of this Court, the timeliness of the appeal depended in fact on an acceptance of the formal order or judgment as an appealable decision, after an opinion had been rendered reciting that the demurrer was sustained:[7]

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[6] The concurring opinion in *United States* v. *Swift & Co.*, 318 U. S. 442, 446, assumes that when a district court sustains a demurrer to an indictment its judgment will be embodied in a formal order.

[7] In *United States* v. *Bowman*, 260 U. S. 94, an opinion was filed February 16, 1921, concluding: "Demurrer sustained." A formal order sustaining the demurrer was entered and filed March 25, 1921. Petition for writ of error was filed March 30, 1921.

In *United States* v. *Katz*, 271 U. S. 354, an opinion was filed April 29, 1925, concluding: "* * * the demurrers are therefore sustained and the indictments quashed." An order sustaining the demurrers was dated and filed July 6, 1925. Petition for writ of error was filed on the latter date.

In *United States* v. *Borden Co.*, 308 U. S. 188, an opinion was filed July 13, 1939, concluding that the demurrers "must be sustained." An order sustaining the demurrers was filed July 28, 1939. Petition for appeal was filed August 17, 1939.

Compare also *United States* v. *Lanza*, 260 U. S. 377, in which an opinion was filed October 18, 1920, concluding: "The

These precedents, it is submitted, are entirely sound. An opinion of a court announcing its conclusion and the reasons therefor does not constitute its judgment.[1] Particularly in applying a statute regulating the right of appeal, a construction is to be favored which will avoid unnecessary uncertainty and which will promote uniformity within the federal judicial system. This result is achieved by construing the phrase "decision or judgment" in the Criminal Appeals Act as referring to the formal judgment entered as such, at least where such a judgment is in fact entered.[2]

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plea to ≡5245 and ≡5568 is sustained, and to ≡5350, 5573, and 5570 is overruled." An order sustaining the pleas was entered January 24, 1921. Petition for a writ of error was filed February 2, 1921. This case may be distinguishable in that the pleas set up facts in bar and were held sufficient but the Government may have been given an opportunity to answer the pleas on the facts before the final order was entered.

[1] 1 Freeman, *Judgments* (5th ed.), sec. 3; *G. Amsinck & Co. v. Springfield Grocery Co.*, 7 F. (2d) 855, 858 (C. C. A. 8). In the federal courts an opinion is not part of the record proper and it is included in the transcript certified to the appellate court only as required by rules of court. *England v. Gebhardt*, 112 U. S. 502, 506; *Childs v. Williams*, 212 Fed. 151, 152 (C. C. A. 8); *Mutual Reserve Fund Life Ass'n v. DuBois*, 85 Fed. 586, 589 (C. C. A. 9), certiorari denied, 171 U. S. 688; 6 Longsdorf, *Cyclopedia of Federal Procedure*, p. 214.

[2] "Decision or judgment" is undoubtedly employed to mean judgment or its equivalent, *e. g.*, decree or order. Cf. *Ex parte Tiffany*, 252 U. S. 32, 36.

Section 238 of the Judicial Code (28 U. S. C. sec. 345) provides that there may be direct review by this Court of a

Any other construction would give rise to troublesome questions as to the time and basis for appeal. An appellant would have to determine at its peril whether the court's opinion is its judgment (a) when a statement like that made in the present case appears in the body of the opinion rather than at the end, (b) when it is not separately paragraphed, (c) when the grounds for the ruling are set forth in the same sentence, (d) when the words used are "must be sustained" rather than "is sustained," (e) when the opinion is oral.[2]

Even if it be assumed, *arguendo*, that an appeal might have been taken from the action of the district court when its opinion was rendered on March 5, 1943, for reasons of local practice or otherwise, that conclusion would not preclude the entry of a subsequent conventional judgment and appeal therefrom. The ascertainment of the final judgment must be made from the proceedings as a whole. Here it is evident that the district court regarded its judgment of March 31, 1943, as the operative judgment of the court, since two judgments covering the same subject matter could not

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"judgment or decree" of a district court in five classes of cases. One of the classes thus enumerated is that of cases within the Criminal Appeals Act.

[2] To take an appeal in all cases within 30 days from the court's opinion offers no sure solution of the above problems. An appeal from the opinion when the opinion was not in fact the court's "decision or judgment" might be held to be made on a basis not authorized by the Criminal Appeals Act and therefore subject to dismissal.

be outstanding in the same cause. Moreover, the court's allowance of an appeal from the judgment of March 31, 1943, likewise amounted to a declaration that its opinion of March 5, 1943, was not its "decision or judgment." In these circumstances, it seems unnecessary to determine whether an appeal could have been taken from the earlier action of the court if no formal judgment had later been entered. As was said by this Court in *Rubber Company* v. *Goodyear*, 6 Wall. 153, 155–156, concerning a similar situation: "We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." See also *Silsby* v. *Foote*, 20 How. 290, 295, indicating that an appeal might be taken, alternatively, from the pronouncement and entry of a decree or from the signing of the decree by the judge.

Finally, if the action of the court on March 5, 1943, were deemed to be appealable as a judgment, the subsequent signing of a judgment by the district judge amounted to a vacation of that decree and the entry of a fresh judgment. Viewed in this light, the vacation occurred during the term of court, prior to the expiration of the time for appeal, and for cause shown. The occasion

for the court's entry of a judgment on March 31, 1943, is explained in a letter from the deputy clerk of the district court which is copied in Appendix B, *infra*, pp. 42–46. As will there be seen, the United States Attorney applied for the formal order because of prejudicial delay in making an entry in the Court's records to the effect that the indictment was quashed.[11] The trial court retained control over the cause for this purpose,[12] and the judgment thereupon entered become the final judgment, from which the time for appeal commenced. *Union Guardian Trust Co.* v. *Jastromb*, 47 F. (2d) 689 (C. C. A. 6).

In sum, we submit that the judgment of March 31, 1943, and not the opinion of March 5, 1943, constituted the "decision or judgment" of the court for purposes of appeal; that even if the opinion could be deemed to have furnished an appealable decision or judgment without more, it did not preclude the entry of a conventional and effective judgment which would in turn be appeal-

[11] The entry was not made until a date between March 25 and 29, while it was dated March 5, as appears from the transcript certified to this Court. As this entry was stricken through, it was not included in the printed record among the docket entries (cf. R. 33).

[12] Compare the practice of this Court, where there has been a justifiable misunderstanding in the court below or other good cause, of vacating the decree below in order that a fresh decree may be entered from which a timely appeal to the proper court may be taken. See *Oklahoma Gas & Electric Company* v. *Oklahoma Packing Company*, 292 U. S. 386, 392; *Phillips* v. *United States*, 312 U. S. 246, 254.

able; and that, in any event, the earlier action of the court was properly superseded by its entry of judgment.

B. THE CASE IS ONE IN WHICH THE CRIMINAL APPEALS ACT AUTHORIZES A DIRECT APPEAL TO THIS COURT

The court below held that the Emergency Price Control Act did not authorize the maintenance of prosecutions for violation of a regulation after the regulation has been revoked or superseded. From this holding an appeal lies to this Court under either of two provisions of the Criminal Appeals Act: the provisions authorizing appeals from a judgment of a district court (a) "sustaining a special plea in bar, when the defendant has not been put in jeopardy," and (b) quashing an indictment "where such decision or judgment is based upon the * * * construction of the statute upon which the indictment or information is founded."

(a) The pleas sustained in the present case, while contained in so-called "motions to quash" (R. 12, 16, 17, 20), were in substance pleas in bar, and the decision thereon is directly appealable. Pleas raising the defense, for example, of the statute of limitations or former acquittal, though denominated pleas in abatement or motions to quash, are in substance pleas in bar and so comprehended within this provision of the Criminal Appeals Act. The governing criterion is not form but substance, as was made clear in *United States v. Goldman*, 277 U. S. 229, 236–237:

Whether the judgment sustaining the motion of the defendants in error and dismissing the information on the ground that the prosecution was barred by the statute of limitations, was a "judgment sustaining a special plea in bar" within the meaning of the Act, is to be determined not by form but by substance. *United States* v. *Thompson*, 251 U. S. 407, 412. The material question in such cases is the effect of the ruling sought to be reviewed. It is immaterial that the plea was erroneously designated as a plea in abatement instead of a plea in bar. *United States* v. *Barber*, 219 U. S. 72, 78, or that the ruling took the form of granting a motion to quash which was in substance a plea in bar, *United States* v. *Oppenheimer*, 242 U. S. 85, 86, *United States* v. *Thompson*, *supra*, 412. Here the motion to dismiss raised the bar of the statute of limitations upon the facts appearing on the face of the information, and was equivalent to a special plea in bar setting up such facts. And the effect of sustaining the motion was the same as if such a special plea in bar had been interposed and sustained.

In the present case the defense which the district court sustained was clearly one in bar. If the effect of the judgment, "unless reversed, is to bar further prosecution for the offense charged," it "follows unquestionably that, without regard to the particular designation or form of the plea or its propriety," this Court has jurisdiction under the provisions of the Criminal Appeals Act an-

thorizing direct appeal to it from a decision or judgment sustaining a special plea in bar. *United States* v. *Murdock*, 284 U. S. 141, 147. The court below held that the power to prosecute appellees for violation of Maximum Price Regulation No. 169 terminated with the revocation of this regulation. The plea which the court sustained was not based on the insufficiency of the indictment or on irregularities in the grand jury proceedings. The plea sought, not merely an abatement of the indictment, but a complete bar to any further prosecution for the offenses charged. The defense sustained, in the nature of confession and avoidance, was directed to the merits of the charges laid in the indictment, that is, that upon the facts set forth in appellees' motions they could not be held to answer the offenses charged. In substance, therefore, the judgment of the district court was a judgment sustaining a special plea in bar.[13]

In *United States* v. *Chambers*, 291 U. S. 217, this Court entertained an appeal under the Criminal Appeals Act under circumstances substantially like those here. In that case Chambers, one of two defendants indicted for conspiring to violate the National Prohibition Act, pleaded guilty but imposition of judgment was deferred. After ratification of the Twenty-first Amendment he filed a plea in abatement, and the other defendant filed

[13] "By a plea in bar the defendant shows, by matter extrinsic of the record, that the indictment is not maintainable." 2 Bishop, *New Criminal Procedure* (2nd ed.), sec. 742.

a demurrer, upon the ground that repeal of the Eighteenth Amendment deprived the court of jurisdiction to prosecute the charge against them. The district court sustained this contention and entered judgment dismissing the indictment as to both defendants. The Government in its jurisdictional statement supported jurisdiction on appeal as to Chambers upon the ground that the judgment of the district court was in substance a judgment "sustaining a special plea in bar."[11]

(b) The Government also submits that this Court has jurisdiction under the provisions of the Criminal Appeals Act authorizing direct appeal to it from the decision or judgment of a district court quashing an indictment where the decision or judgment is based upon the construction of the statute upon which the indictment is founded.

The district court construed the penalties imposed by Section 205 (b) of the Emergency Price Control Act of 1942, the statute on which the indictment was founded, as being applicable only to regulations of the Price Administrator which are in force at the time of prosecution. The fact

[11] The jurisdictional statement also urged that since the purpose of the plea in abatement was to arrest the judgment which the court would ordinarily have entered upon the plea of guilty, the case came within the provisions of the Criminal Appeals Act authorizing appeal from "a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

that the court was led to its conclusion as to the meaning of the statute by the application of certain general legal principles in the nature of a presumption, rather than by an interpretation of the particular phraseology of the Price Control Act, is immaterial. In *United States* v. *Borden Co.*, 308 U. S. 188, the ground upon which the district court sustained a demurrer to an indictment charging a conspiracy to restrain interstate commerce in milk was that subsequent federal legislation had removed agricultural products, including milk, from the purview of the Sherman Act. Although this decision involved no interpretation of the specific provisions or language of the Sherman Act, this Court, in taking jurisdiction under the Criminal Appeals Act, said (p. 195) that "the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation." So here, the Price Control Act was not the less construed because it was construed in the light of the supposed application to it of certain general principles of statutory construction.[13]

United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, confirms our position. That case was an appeal from a decision sustaining a demurrer to an indictment upon the ground that

[13] The fact that the court below suggested (R. 28) that perhaps a saving clause by the Administrator would have been authorized and effective, does not affect this conclusion. The court held that Section 205 (b) of the Act does not, *ex proprio vigore*, authorize the present prosecution.

the statute upon which it was founded was invalid. The demurrer also sought relief from prosecution upon substantially the same ground as that upon which the district court based its decision in the present case, namely, that the proclamation of the President which the defendants were charged with conspiring to violate had been revoked prior to the return of the indictment. This Court considered and passed upon this ground of demurrer, which the district court had rejected, and based its assumption of jurisdiction (see p. 330) upon the ground that the issue presented constituted "a proper subject of review by this court under the Criminal Appeals Act."[17]

Thus the very cases which have dealt most recently with the problem presented here on the merits—the *Chambers* and *Curtiss-Wright* cases—reached this Court under the Criminal Appeals Act.

[16] The proclamation was issued under the authority of a Joint Resolution of Congress, which penalized violation of any Presidential proclamation issued thereunder.

[17] The significance of this holding is not affected by the fact that the case was otherwise properly before this Court under the Criminal Appeals Act. The rule had been settled that the Criminal Appeals Act vests this Court with jurisdiction to review only decisions "concerning the subjects embraced within the clauses of the statute" and that appeal thereunder does not "open here the whole case." *United States* v. *Keitel*, 211 U. S. 370, 398–399; *United States* v. *Kissel*, 218 U. S. 601, 606; see *United States* v. *Borden Co.*, 308 U. S. 188, 193.

II

REVOCATION OF MAXIMUM PRICE REGULATION NO. 169 DID NOT TERMINATE LIABILITY FOR VIOLATIONS THEREOF COMMITTED PRIOR TO REVOCATION

The district court held that the rule that the repeal of a statute terminates the power to prosecute for prior violations (unless the legislature has kept that statute alive for this purpose) applies to revoked administrative regulations. The reason behind the rule is that "if the prosecution continues the law must continue to vivify it" (*United States* v. *Chambers*, 291 U. S. at 226) or, as stated in *United States* v. *Tynen*, 11 Wall. 88, 95:

> There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. * * *

An entirely different situation is presented when prosecution for violation of an administrative regulation is commenced or continued after the regulation has been revoked. Revocation or amendment of the regulation does not and could not repeal the statutory provisions. While the regulation was necessary to call the statutory penalties into play, it is the statute, not the regulation, which establishes the crime and fixes the penalty.[15] Notwithstanding revocation of the reg-

[15] In *United States* v. *Grimaud*, 220 U. S. 506, this Court, in upholding the constitutionality of a statute authorizing the promulgation of certain administrative regulations and making violation thereof a crime, said (p. 522): "A viola-

ulation there is a continuing statute vitalizing the prosecution of violations of the statute committed while the regulation remained in force. The only effect of revocation is that the particular acts which the regulation prohibited would not, if done thereafter, constitute a violation of the statute.

United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, is, we submit, controlling on the question.[19] A Joint Resolution of Congress provided that if the President found that prohibition of the sale of arms and munitions of war to countries engaged in armed conflict in the Chaco might contribute to peace between these countries and make a proclamation to that effect, it should be unlawful to sell such articles to the countries engaged in this conflict until otherwise ordered by the President or by Congress. The defendants demurred to an indictment charging a conspiracy to sell arms of war in violation of the Joint Resolution and of the President's proclamation thereunder, upon the ground that the President had revoked his proclamation prior to the return of the indictment. This Court held that revocation of the proclamation did not terminate liability for offenses committed while it had been in effect. It

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tion of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

[19] The opinion of the court below does not discuss or cite the *Curtiss-Wright* case.

said (p. 332) that when the President revoked his first proclamation the Joint Resolution "ceased to be a rule for the future" but it "did not cease to be the law for the antecedent period of time." The Court also said (pp. 331–332):

> It was not within the power of the President to repeal the Joint Resolution; and his second proclamation did not purport to do so. It "revoked" the first proclamation; and the question is, did the revocation of the proclamation have the effect of abrogating the resolution or of precluding its enforcement in so far as that involved the prosecution and punishment of offenses committed during the life of the first proclamation? We are of opinion that it did not.
>
> * * * The second proclamation did not put an end to the law or affect what had been done in violation of the law. The effect of the proclamation was simply to remove for the future, a condition of affairs which admitted of its exercise.

While the President's second proclamation contained a proviso that revocation of the original proclamation should not extinguish any penalty incurred thereunder or under the joint resolution of Congress, this Court, in discussing the effect of revocation, did not mention this saving clause.[2] The clause was not merely immaterial; the whole tenor of this Court's opinion makes it

[2] Cf. *United States* v. *Curtiss-Wright Export Corp.*, 14 F. Supp. 230, 237 (S. D. N. Y.), where the point is discussed.

plain that, as Congress had defined the offense and specified the penalties, there was no room for executive action either saving prosecutions on the one hand or granting legal immunity on the other. Congress did not delegate, any more than in the ordinary criminal statute, authority to determine the duration of liability for conduct which Congress declared to be criminal.

Barker v. *United States*, 86 F. (2d) 284 (C. C. A. 8), decided shortly prior to the decision of this Court in the *Curtiss-Wright* case, is also directly in point. The defendants in the *Barker* case were indicted for conspiring to transport intoxicating liquors into Arkansas in violation of a federal statute making it unlawful to transport intoxicating liquors into any State the law of which prohibited manufacture or sale of intoxicating liquors for other than beverage purposes. The court rejected the defense that the prosecution could not be maintained because the Arkansas statute prohibiting manufacture and sale of intoxicating liquors had been repealed, saying (p. 285):

> Congress having made it a crime to import liquor into a state for beverage purposes while the laws of the state prohibit the manufacture or sale therein of such liquor, such crime is complete when the importation takes place. No repeal of its prohibitory laws by the state thereafter could constitute a forgiveness of the federal offense or deprive the United States and its courts of the right to prosecute and to try those

> charged therewith. * * * All importations of intoxicating liquor into Arkansas for beverage purposes prior to March 16, 1935, were offenses against the United States and remained such after the repeal. * * *

One reason given for the rule that the repeal of a statute terminates the right to prosecute for violations thereof is that, by the repeal, "the legislative will is expressed that no further proceedings be had under the act repealed" (*United States* v. *Tynen, supra*, p. 95).[21] The underlying reason for this rule is, we take it, that the repeal is presumed to indicate so basic a change in the sense of the community that it no longer condemns the conduct previously prohibited and therefore does not wish to continue the prosecution of prior offenses. But where a statute like the Emergency Price Control Act of 1942 provides for continuing price control through the medium of varying administrative orders and regulations, the purpose in penalizing violations of the regulations is to assure obedience to those currently in effect, and there is no basis for presuming that Congress intended that amendment or revocation of any particular regulation should be a grant of amnesty for prior violations.

Congress, of course, could have provided that any prosecution for violation of an administrative regulation issued under the Price Control Act

[21] In *Maryland* v. *B. & O. R. R. Co.*, 3 How. 534, 552, the Court said, "The repeal of the law imposing the penalty, is of itself a remission."

should terminate upon revocation of the regulation. Possibly the courts might infer that Congress intended the statute to have this effect if there were compelling policy considerations for doing so. Considerations of policy, however, point in the opposite direction. That the fixing of maximum prices under the standards set by the Price Control Act [22] requires a high degree of flexibility in administration, with periodic revisions of maximum price determinations to give effect to the results of changing conditions, practical experience, or further data or study, would seem to be a matter of judicial notice.[23] The statute itself contains numerous provisions which expressly authorize or provide for revision of the Administrator's maximum price determinations, and the statute prescribes in detail the procedure for securing revision or adjustment.[24] It is not

[22] The general standard in Section 2 (a) is that the Administrator establish such maximum price "as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act," but in applying this standard the Administrator is directed to give consideration to many complex factors. See Secs. 1 (a), 2 (a), 3 (a)–(c).

[23] The Office of Price Administration has advised the Department that since the enactment of the Emergency Price Control Act of 1942 more than 400 regulations have been issued, followed by thousands of revisions and amendments promulgated as conditions dictated such revision or amendment.

[24] The Administrator is directed, upon request by any substantial portion of an industry subject to maximum price regulation, to appoint an industry advisory committee and to consult with the committee with respect to the regulation and "adjustments therein" (Sec. 2 (a)). He is authorized

to be supposed that Congress intended to coddle wilful violators of wartime price controls by holding out the prospect that as the administrative machinery functioned it would inevitably produce reprieves for wilful violations.

If the so-called common-law rule regarding the effect of repeal of a statute were applicable, the criminal sanctions of the Act would be rendered largely ineffective. It would be necessary to reckon with the rule that the enactment of a statute containing provisions inconsistent with those of an earlier statute is a repeal of the latter.[25] It would follow that every substantial revision of a regulation would constitute a revocation. Since

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to issue "temporary regulations" fixing maximum prices without observing the provisions generally applicable to exercise of his price-fixing powers, but any such temporary regulation, which is to be effective for not more than 60 days, may be "replaced by" a regulation issued in accordance with the prior provisions of the subsection (Sec. 2 (a)).

If a protest against a price regulation is filed the Administrator may grant or deny it in whole or in part (Sec. 203 (a)). If the protest is not fully granted a complaint may be filed with the Emergency Court of Appeals, which is authorized to "set aside" the regulation in whole or in part, and the regulation may be "modified or rescinded" by the Administrator at any time during the pendency of such complaint (Sec. 204 (a)).

After the Administrator authorized by the act takes office, any maximum price schedule previously issued by certain named officials shall have the same effect as if issued under Section 2 of the act until such schedule is "superseded by" action taken pursuant to Section 2 (Sec. 206).

[25] *United States* v. *Tynen*, *supra*; *Norris* v. *Crocker*, 13 How. 429, 440; *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 506.

the rule applies not only to prosecutions begun after repeal but also to those pending in a trial or appellate court at time of repeal,[28] violators of a maximum price regulation could, if revocation terminates the power to prosecute, escape punishment by the simple expedient of keeping the court proceedings alive until the violated regulation has been superseded. It is not reasonable to assume that Congress, when it imposed criminal penalties for willful violations of the Administrator's maximum price regulations, intended that these penalties should be largely ineffective.

Congress disclosed its intention with respect to past violations of presently inoperative regulations by making provision for the situation which alone would raise a genuine problem: the repeal or termination of the Act itself. Congress expressly provided (Sec. 1 (b)) that the repeal, or the termination of the Act by time limitation, shall not affect prosecutions for prior violations, and that all "regulations, orders, price schedules, and requirements" under the Act "shall be treated as still remaining in force for the purpose of sustaining" such prosecutions. The fact that Congress took pains to assure that the repeal or expiration of the entire statute should not terminate prosecutions for prior violations of the

[28] *United States* v. *Tynen*, *supra*; pp. 92–94; *Norris* v. *Crocker*, *supra*; pp. 439–440.

regulations is a clear indication that, *a fortiori*, Congress did not intend the mere revocation of such regulations during the life of the statute to destroy the power to penalize prior willful violations.

The apparent theory of the court below was that, since the issuance of maximum price regulations is a step in the legislative process, the effect of revocation is to be determined by the rule governing the repeal of a statute. If it be assumed *arguendo* that this theory is correct and that, for the purpose of determining the effect of revocation, the administrative regulation is to be assimilated to the statute under which it is issued, we submit that, upon the same theory, it must also be assimilated to the statute for the purpose of determining the application of Section 13 of the Revised Statutes.

Section 13 (*infra*, p. 41) provides that the repeal of a statute shall not extinguish any penalty incurred thereunder unless the repealing act expressly so provides. It has been held to apply where the basis for prosecution or liability is a revoked administrative regulation.

In *Landen* v. *United States*, 299 Fed. 75 (C. C. A. 6), the indictment charged a conspiracy to sell intoxicating liquor in excess of the amounts permitted by a regulation issued by the Secretary of the Treasury which had been revoked prior to the prosecution. The court held (p. 78) that even if

there were effective analogy between statutory repeal and abrogation of an administrative regulation, the right to maintain the prosecution was preserved by Section 13, R. S., which had abolished the common-law rule as to statutory repeal.[27] State decisions have taken the same view.[28]

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[27] Cf. *DeFour* v. *United States*, 260 Fed. 596, 599–600 (C. C. A. 9), certiorari denied, 253 U. S. 487; *Goublin* v. *United States*, 261 Fed. 5 (C. C. A. 9).

[28] *United States* v. *Williams*, 8 Mont. 85, was a suit to recover for the value of timber cut on the public domain. A statute permitted cutting such timber subject to such rules and regulations as the Secretary of the Interior might prescribe. It was held that liability for cutting timber in violation of the regulations of the Secretary then in force was not affected by the fact that the regulations violated had later been revoked. The court said (pp. 94–95) that any doubt as to the plaintiff's right to maintain the suit was settled by Section 13, R. S., that the Secretary's regulations became "*sub modo* a part of the act of Congress itself" and therefore came within the provisions of Section 13 relating to the repeal of statutes.

In *People* v. *Moynihan*, 200 N. Y. S. 434, 439–440, prosecution for violation of a revoked administrative regulation was upheld upon the ground that prosecution was saved by a section of the General Construction Law of New York similar in its terms to Section 13 of the Revised Statutes.

CONCLUSION

It is respectfully submitted that the judgment of the district court should be reversed.

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OCTOBER 1943.

APPENDIX

The Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. Supp. II, sec. 682, provides in part as follows:

> That an appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.
>
> * * * * *
>
> The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

The Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. Supp. II, sec. 901 *et seq.*, called the Emergency Price Control Act of 1942, provides in part as follows:

> SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *
>
> (b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on

June 30, 1943,[1] or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

* * * * *

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or

[1] By the Act of October 2, 1942, 56 Stat. 767, the date June 30, 1944, was substituted for June 30, 1943.

other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. * * * In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such

action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 * * *.

* * * * *

SEC. 203 (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in sup-

port of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection * * * the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,*

That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. * * *

* * * * * *

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

* * * * * *

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. * * *

Section 13 of the Revised Statutes, 1 U. S. C. sec. 29, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES

District of Massachusetts

Office of the Clerk

1525 Federal Building, Boston

JULY 29, 1943.

JOHN HENRY LEWIN, Esq.,
Acting Assistant Attorney General, Department of Justice, Washington, D. C.

Re: *United States* v. *Jacob Hark et al.* File—KLK 146-18-50-4.

DEAR SIR: The United States Attorney has handed me your letter of July 20, 1943, relating to the case of *United States* v. *Jacob Hark et al.*, in which you request a letter about the docket entry of March 5th in that case.

On March 5th Judge Sweeney handed down an opinion granting the defendant's motion to quash. The practice in this District, on the receipt of an opinion granting a motion to quash, is to make an entry on the docket under the judge's name, "Indictment quashed." It is not the practice to have a written order.

When a certified copy of the docket entries was given to the United States Attorney on March 25 to be used on the appeal, no entry quashing the

indictment under date of March 5 had then been made. This entry was made shortly thereafter. It was made without any consultation with the judge and the judge had no knowledge, so far as I know, of the exact language of the entry.

On March 29 the United States Attorney advised us that he had been unable to file an appeal because there was no docket entry quashing the indictment. He was surprised to see that between March 25 and March 29 the entry had been made. He then asked the judge for a written order quashing the indictment. The judge granted the request and when an order was presented to him on March 31, he directed that it be entered. The order was noted on the docket under that date. The judge gave no directions about the striking of the original entry, so far as I can recollect, but he was told that it had been stricken out.

Respectfully yours,

ARTHUR M. BROWN,
Deputy Clerk.

AMB–JDF.

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